Supreme Court, U.S.
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No. 95-774

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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January 29, 1996

AMENDMENT TO RULE 29.6 STATEMENT*

The following are additional non-wholly owned subsidiaries of Time Warner Entertainment Company, L.P. ("TWE"):

The Bountiful Company Limited (U.K.)
Dagmar Teatret I/S (Denmark) (partnership)
HBO Pacific Partners, C.V. (Neth. Antilles)
Movie World Enterprises Partnership (Australia)
Sari Lodge Pty. Limited (Australia)
Scala Biografome I/S (Denmark) (partnership)
Sea World Enterprises Partnership (Australia)
Time Warner Cable of New Zealand Holdings Ltd. (New Zealand)
Time Warner Entertainment Germany GmbH and Co. OGH (Germany)
Time Warner Germany Holding GmbH (Germany)
Warner Bros. Movie World GmbH & Co. KG (Germany)
Warner & Metronome Films A/S (Denmark)

The following are non-wholly owned subsidiaries of the general partners of TWE:

American Lawyer Media, L.P. (partnership)
The Columbia House Company (partnership)
The Columbia House Company (Canada) (partnership)
Public Cable Company (partnership)

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* TWE's Rule 29.6 statement can be found at Appendix F of its Petition for Writ of *Certiorari*.

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PRELIMINARY STATEMENT

Respondents do not dispute that Judge Randolph's First Amendment review of the Federal Communications Commission's cable rate regulations explicitly "incorporat[es] by reference" and "rel[ies] upon Judge Ginsburg's discussion regarding the reasonableness of those [regulations]". (Br. in Op. 17-18 n.6.) Nor do Respondents dispute that Judge Ginsburg reviewed the cable rate regulations under the "arbitrary and capricious" standard that typically applies to administrative rulemaking. (*Id.* 10.) In fact, far from disputing that the Court of Appeals equated First Amendment scrutiny with traditional administrative review, Respondents contend that the First Amendment requires nothing more: The First Amendment is satisfied, they argue, so long as Congress's statutory scheme passes intermediate scrutiny and the FCC's decision to impose an across the board 17% rate reduction on First Amendment speakers is not "arbitrary and capricious" under the Administrative Procedure Act ("APA"). (*Id.* 17-22.)

That remarkable proposition, however, is precisely why this case is worthy of *certiorari*. Prior to the decision below, no court had equated review under the APA with First Amendment scrutiny, *see, e.g.*, *Century Communications Corp. v. FCC*, 835 F.2d 292, 299 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988), and no court had applied a deferential standard of review to regulations that restrict the price the press may charge for speech, *see, e.g.*, *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-89 (1988). There is nothing special about administrative rulemaking for First Amendment purposes. Under basic First Amendment and Article I principles, administrative rules must be subject to the same degree of

First Amendment scrutiny (if not more) as congressional legislation.[1]

By invoking the protections of the First Amendment within the administrative context, Petitioner does not, as Respondents contend, "constitutionalize the economic regulation of the communications industry", or ask Federal courts to set the breadth and depth of cable rate regulations. (Br. in Op. 21.) Petitioner does not here argue that the Commission can make only one permissible regulatory choice where First Amendment liberties are at stake. Rather, the First Amendment requires the Commission to meet the applicable standard of First Amendment scrutiny before promulgating regulations that burden speech. Such a constitutional requirement is consistent with the precedents of this Court, and its enforcement does not overburden or stretch the institutional competence of Federal courts.[2]

The proper application of First Amendment scrutiny in the administrative context is a matter of no small moment. It is not, as Respondents contend, merely the review of technical or economic questions better left to agency discretion. (Br. in Op. 20-22.) The FCC's implementation of Congress's mandate to charge "reasonable rates" has a more profound effect on the speech of cable operators than Congress's decision to regulate in the first instance. The FCC's regulatory

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[1] *See Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994) (intermediate scrutiny requires regulations to be narrowly tailored to meet a substantial government interest); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 123 (1991) (strict scrutiny requires regulations to be precisely tailored to advance a compelling government interest).

[2] In fact, this Court need look no further than Judge Ginsburg's analysis under the APA to determine that the cable rate regulations do not pass even intermediate First Amendment scrutiny. *See* Pet. 24-30; *infra* 6-7.

choices—the breadth and depth of the cable rate rollback—can mean the difference between billions of dollars received by cable operators in exchange for their speech and hence spent by cable operators on future speech. First Amendment liberties are at serious risk if the FCC's decisions are subject only to garden-variety, deferential administrative review. Moreover, over the next decade, the FCC will assume an ever broader role in regulating media entities. Accordingly, this case offers the Court a clear opportunity to establish the proper role of First Amendment scrutiny when administrative regulations target the activities of media speakers.

ARGUMENT

I. FEDERAL COURTS MUST REVIEW FCC RULEMAKING UNDER TRADITIONAL FIRST AMENDMENT STANDARDS.

The Court of Appeals did not articulate a theory for equating First Amendment review of the Commission's cable rate regulations with traditional administrative review. Rather, the Court below (per Judge Randolph) simply held in conclusory fashion that the Commission's decision to impose an across the board 17% rate reduction on virtually all cable operators passed First Amendment scrutiny for the same reasons that it was not "arbitrary and capricious" under the APA. (Pet. App. 55a n.10, 56a n.12.) Respondents attempt to articulate the missing rationale: The First Amendment requires no more than garden-variety administrative review of agency rulemaking, so the argument runs, because "concerns for institutional competence mandate judicial deference to technical judgments made by an expert agency". (Br. in Op. 20.) There is nothing about the FCC's rulemaking, however, which removes it from this Court's First Amendment precedents.

A court must "exercise independent judgment when First Amendment rights are implicated". *Turner*, 114 S. Ct. at

2471. If the rule were otherwise, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified". *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Thus, although legislative judgments are entitled to some deference, "they are [not] insulated from meaningful judicial review altogether". *Turner*, 114 S. Ct. at 2471; *see also Landmark*, 435 U.S. at 843 ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). The government cannot be left to itself to decide whether a law that burdens First Amendment rights actually advances the government's purported interest and is adequately tailored to do so. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989).

Administrative agencies can be trusted no more than Congress to protect First Amendment liberties. At the very minimum, First Amendment scrutiny must apply in the same manner to both administrative rulemaking and congressional lawmaking. This follows inexorably from the Article I principle that an administrative agency derives its rulemaking authority from Congress and cannot act in a manner forbidden to Congress. (Pet. 21.) If the rule were otherwise, Congress could evade the requirements of the First Amendment whenever it promulgated a broad statutory mandate and delegated the substance of that mandate to administrative rulemaking.[3] First Amendment liberties cannot be left virtually unreviewable in the hands of Article I agencies, but rather must be protected by Article III courts.

Those courts are not, as Respondents contend (Br. in Op. 20-21), institutionally incapable of applying normal First

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[3] *See INS v. Chadha*, 462 U.S. 919, 952-59 (1983) (holding Congress cannot evade restraints spelled out in Constitution through delegation to agency).

Amendment scrutiny to administrative rulemaking. Unlike Congress, the FCC is required to make a record to accommodate judicial review, which makes it far easier for a court to apply First Amendment scrutiny to the Commission's cable rate regulations than to a typical congressional enactment. *Turner*, 114 S. Ct. at 2471. The FCC's professed expertise does not inhibit a court from reviewing that record:

> Independent judicial judgment is especially appropriate in the First Amendment area. Judicial deference to agency fact-finding and decisionmaking is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment.

Porter v. Califano, 592 F.2d 770, 780 n.15 (5th Cir. 1979).[4] Indeed, a court's obligation to review FCC rulemaking with independent judgment does not require it to set cable rates.[5]

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[4] Prior to the decision below, the D.C. Circuit had applied a similar rule. *See, e.g., Century*, 835 F.2d at 299 ("the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake"). In fact, where First Amendment liberties are at stake, this Court has shown mistrust for complex economic arguments. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 590 n.12 (1983) ("[w]hen delicate and cherished First Amendment rights are at stake, . . . the constitutional tolerance for error diminishes drastically").

[5] Respondents miss the mark when they argue that the First Amendment does not require the "government to demonstrate that the precise line between lawful and unlawful conduct is the best . . . one that could be drawn". (Br. in Op. 20 n.8 (citing *Burson v. Freeman*, 504 U.S. 191, 210 (1992); *Buckley v. Valeo*, 424 U.S. 1, 30 (1976).) Petitioner does not here contend that only one regulatory scheme can pass First Amendment scrutiny. No court has ever held, however, that an agency's decision to place a limit on speech is immune from First Amendment scrutiny because that decision involves a process of "line drawing". *See, e.g., United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) (holding that

(Br. in Op. 21.) Rather, it merely requires a court to examine the record to determine whether the FCC's broad and deep cuts to cable rates are adequately supported under First Amendment scrutiny. Federal Courts are not only capable of performing that task, they must perform that task to protect First Amendment liberties.[6]

II. THE FCC'S CABLE RATE REGULATIONS ARE NOT ENTITLED TO DEFERENCE.

Regardless of the validity of Respondents' theory that the First Amendment should be applied in a particularly deferential manner to agency rulemaking, such deference is not warranted here. The Court of Appeals (per Judge Ginsburg) candidly admitted that the FCC's rate regulations are based on (1) simplifying assumptions and hypotheses, not actual facts, much less technical or complex facts and (2) the inability of Petitioner to disprove those assumptions and hypotheses.[7] *See Turner*, 114 S. Ct. at 2470-72 (unsupported assumptions do not satisfy First Amendment scrutiny); *Sable*, 492 U.S. at 129 (same). Moreover, as the Court of Appeals

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decision of agency to place 60-decibel limit on music performed in parks is not entitled to deference under *Chevron*).

[6] As Respondents note, Petitioner does not here challenge the authority of Congress to require cable operators to charge reasonable rates for purposes of its Petition. (Br. in Op. 21.) That issue is currently pending before the D.C. Circuit. (Pet. at 3 n.7.) Even if Congress could impose a "reasonableness" requirement, this case is nonetheless important from a First Amendment standpoint. The actual implementation of that requirement greatly exacerbates the "bite" of price regulation on First Amendment speakers.

[7] *See* Pet. App. 12a (assumption that low penetration data includes systems with market power); *id.* 14a (hypothesis that overbuild systems are engaged in collusive behavior); *id.* 15a (assumption that intensity of competition between cable systems is directly related to amount of overlap); *id.* 16a (simplifying assumption regarding amount of overlap); *id.* 15a, 18a (cable operators did not disprove assumptions).

found, the FCC's assumptions were reasonable "if only because it would have been virtually impossible to derive a more precise understanding . . . in the time available". (Pet. App. 15a.)[8] That rationale—simple expediency—can never be a ground for relaxing the requirements of the First Amendment, particularly where, as here, the restriction on speech imposes a blunt, across the board mandate.[9]

III. THE COST-OF-SERVICE OPTION DOES NOT PASS FIRST AMENDMENT SCRUTINY.

The Respondents' last line of defense against First Amendment scrutiny is the FCC's cost-of-service option. (Br. in Op. 21.) As demonstrated in the Petition, however, the cost-of-service option does not shield the rate regulations from the bite of First Amendment scrutiny. (Pet. 28-30.) *First*, the government (not the speaker) bears the burden of demonstrating that a regulation restricting speech is sufficiently tailored to promote the alleged government interest. The FCC's rate regulations, however, place the burden on cable operators to disprove that they are charging monopolistic prices through a cost-of-service proceeding. A regulatory scheme that relieves the government of its burden of proving that its regulations are narrowly tailored violates the First Amendment. *Second*, the cost-of-service option does not adequately protect cable operators. As Judge Ginsburg found, "a cost-of-service regulatory proceeding is expensive

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[8] *See also* Pet. App. 13a (Commission could not prove "without collecting and analyzing extensive data"); *id.* 14a ("Commission's explanation cannot be proven without additional data").

[9] *See* Pet. 26-27. Moreover, as a factual matter, once the Commission adopted the 10% rate reduction there was no reason why the Commission could not collect additional data before further lowering cable rates. *See* 47 U.S.C. § 543(b)(2) ("[w]ithin 180 days after October 5, 1992, the Commission shall prescribe, and *periodically thereafter revise*, regulations") (emphasis added).

for the cable operator". (Pet. App. 22a.) Thus, "the FCC can be confident that an operator will not lightly choose that option and it will indeed remain a limited exception to the general rule". (*Id.*)[10] Such a narrow and burdensome exception cannot cure the First Amendment defect in overbroad regulations.[11]

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[10] The Respondents argue that the "FCC was extremely successful in developing a streamlined alternative, since only about 6% of all cable operators opted for a cost-of-service showing". (Br. in Op. 21 (citing Gov't C.A. Br. 72).) Respondents have it backwards. The cost-of-service showing is so burdensome that (according to the FCC's representation in its brief below) only 6% of cable operators have invoked the exception. The FCC presented no facts below demonstrating that the cost-of-service option is a viable alternative, and the court below found the opposite—that the cost of invoking the proceeding makes it a narrow exception.

[11] Respondents argue that because the FCC might require all cable operators to go through a cost-of-service proceeding, it can therefore enact imprecise regulations with a narrow cost-of-service alternative. (Br. in Op. 21.) That argument is based on several false premises. First, it is unclear that the Commission could enact a pure cost-of-service regime under its statutory mandate. 47 U.S.C. § 541(c) ("cable system shall not be subject to regulation as a common carrier or utility"). Second, it is not true, as Respondents presume, that any cost-of-service regime would be consistent with the First Amendment. Certainly an overly burdensome or unduly expensive cost-of-service regime would fail First Amendment scrutiny where a less burdensome regime would be just as effective. Indeed, the cost-of-service option adopted by the Commission is itself deeply flawed. Third, Respondents presume that the FCC's regulatory regime leaves cable operators in the same position as a pure cost-of-service regime. That is not so. If all cable operators are subject to a cost-of-service regime, then the entire industry absorbs the costs of that regime. But with the FCC's rate regulations, only cable operators who are charging competitive rates and thus are severely harmed by the FCC's 17% rate reduction must absorb the expense of the cost-of-service proceeding to escape that reduction. Those cable operators must choose between the frying pan (a 17% rate reduction) and the fire (a cost-of-service proceeding). This places them in a far worse position than cable operators who are charging monopolistic prices and thus are not severely harmed by the FCC's 17% rate reduction.

IV. CABLE RATE REGULATIONS TRIGGER STRICT SCRUTINY.

Respondents contend that the cable rate regulations do not trigger strict scrutiny because they are not explicitly content-based. (Br. in Op. 14.) Strict scrutiny, however, also applies to certain content-neutral laws that directly affect the content of speech and thus "distort the market for ideas". *Turner*, 114 S. Ct. at 2468 (citation omitted).[12] As recognized in *Riley*, a price cap on protected speech (such as the rate regulations) triggers "exacting First Amendment scrutiny" because it directly affects both the type of speech (the quality) and the amount of speech (the quantity) provided by the regulated speaker. 487 U.S. at 788-89, 791; *see also Buckley*, 424 U.S. at 19. *Riley* is not distinguishable, as Respondents contend, on the ground that the perceived market power of cable operators is a "special characteristic" of the cable medium. (Br. in Op. 15.) This Court has never held that the standard of First Amendment scrutiny changes depending on the market power of the regulated speaker. In fact, it has held the opposite: Laws that target the largest or most powerful media speakers often run afoul of the First Amendment because such laws distort the market for ideas.[13] Thus, even if cable operators could exercise monopoly power, that fact

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[12] *See also Simon & Schuster*, 502 U.S. at 126 (Kennedy, J., concurring); *Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936) (tax imposed on largest newspapers triggers strict scrutiny because of its tendency to limit circulation).

[13] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249-50, 258 (1974) (holding that First Amendment does not provide less protection to newspapers with monopoly power in a particular geographic area); *see also Minneapolis Star*, 460 U.S. at 578, 591; *Grosjean*, 297 U.S. at 240-41, 250-51.

does not alter their First Amendment rights and remove the rate regulations from the holding of *Riley*.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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